Supreme Court, U.S.
FILED

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NO.

THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1994 TERM

VIVIAN GIVAN-HAMMOUD,

Petitioner,

vs.

ILLINOIS,

Respondent.

Petition for Writ of Certiorari
to the Appellate Court of Illinois,
Second District

PETITION FOR WRIT OF CERTIORARI

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117 pp

QUESTIONS PRESENTED

I. Was a defendant charged with the delivery of altered documents denied her constitutional right to "counsel" when her public defender (a) failed to file pre-trial motions attacking the warrants and supporting affidavits which contained a substantial material misrepresentation, (b) failed to attack the pervasiveness of the search for far exceeding the scope of the warrant, (c) failed to seek to suppress evidence and purported statements obtained pursuant to an illegal search and arrest, (d) failed to request that the jury be instructed as to the definition of "deliver" for the offense of forgery, (e) again failed to request that the jury be instructed as to the definition of "deliver" after the jury requested such an instruction, and (f) excluded the defendant from that portion of the trial

where the jury's request was read and considered by the trial judge and attorneys?

II. Where a pro se defendant failed to file certain pre-trial motions and make certain objections, and was *thereafter* appointed a public defender who rendered ineffective assistance of counsel, did the pro se defendant *prospectively* waive her ineffective assistance of counsel claims against her public defender?

III. Whether the ineffective assistance of counsel test enunciated by this court in Strickland v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, should be reconsidered and modified.

LIST OF PARTIES

The names of all parties to this proceeding appear in the caption of this case.

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REPORTS OF OPINIONS

The only decision delivered in this case, by any other court or administrative agency, was an unpublished order of the Illinois Appellate Court, Second District, filed on December 1, 1993. A copy of this order is included in the Appendix attached hereto.

STATEMENT OF JURISDICTION

This Court possesses jurisdiction over this cause pursuant to 28 U.S.C. 1257.

Defendant Vivian Givan-Hammoud was charged by information with two counts of forgery (by delivery of her altered college transcripts). Following a jury trial, the defendant was found guilty. On February 6, 1992, the defendant was sentenced to 90 days incarceration in the DeKalb County Jail, a thirty month term of probation, a $3000.00 fine, and 300 hours of community service.

On December 1, 1993, the Illinois Appellate Court, Second District, filed its order affirming the Circuit Court. On December 10, 1993, the defendant filed a petition for rehearing. On December 16, 1993, the petition for rehearing was denied.

On January 20, 1994, defendant filed her petition for leave to appeal to the Illinois Supreme Court. The petition was denied on April 6, 1994. On April 20, 1994, defendant filed a motion for leave to file motion to reconsider denial of leave to appeal, with a copy of the motion to reconsider attached thereto. On May 6, 1994, defendant's motion was denied.

Defendant-petitioner is filing this petition for writ of certiorari on July 5, 1994.

CONSTITUTIONAL PROVISIONS INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and caus of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." (U.S. Constitution, Amendment VI.)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. Constitution, Amendment XIV, Section 1.)

STATEMENT OF THE CASE

The instant case was commenced May 23, 1989, with a two count complaint, signed by Northern Illinois University security officer Deborah Pettit. In said complaint, Pettit alleged that the defendant knowingly *"made"* documents apparently capable of defrauding others. (C. 15-16) Based upon these allegations, the magistrate issued a search warrant for a violation of Ill.Rev.Stat. ch. 17-3(a)(1). (C. 17)

On June 28, 1989, defendant Vivian Givan-Hammoud was charged by information with two counts of forgery. However, the information charged a different theory of forgery than was asserted in the complaint for search and arrest warrants. Count I of said information alleged that defendant knowingly *"delivered"* a document apparently capable of defrauding others, to wit: defendant's own college transcript

purportedly made by the University of Michigan, which was delivered to Northern Illinois University. (C. 41) Count II alleged that defendant knowingly "*delivered*" a document apparently capable of defrauding others, to wit: defendant's own college transcript purportedly made by the State University of New York at Buffalo, which was allegedly delivered to Northern Illinois University. No purpose for the transcripts was ever alleged. (C. 41-42)

Also on June 28, 1989, while represented by private counsel, the defendant filed a motion to quash arrest and suppress evidence. The bases for the motion were that the police lacked probable cause at the time they searched and at the time they later arrested defendant, the evidence and purported statements seized were neither made pursuant to a lawful warrant nor incident

to a lawful arrest, and that said evidence statements were obtained in violation of defendant's constitutional rights.[1] (C. 28-29) Also on June 28, the defendant filed a motion to suppress purported statements, based on similar grounds. (R. 26)

On December 20, 1989, the defendant filed a motion to dismiss based upon the county being the improper place for trial and for failure to specify the time and place of the alleged deliveries. Said motion was brought pursuant to Ill.Rev.Stat. ch. 38, par. 114-1(a)(7). (C. 86) On December 28, 1989, the trial court held a hearing on defendant's motion to dismiss based upon the county being the improper place for trial, and defendant's

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[1] While Pettit claims that the defendant confessed, the defendant has consistently denied this. Pettit has never provided any witnesses, recordings or documents supporting her claim.

motion to suppress evidence and quash arrest, and defendant's motion to suppress purported statements. (R. 78 et seq.) At the conclusion of said hearing, the judge denied defendant's motions. (C. 92)

On June 18, 1990, defendant filed a motion to dismiss on the grounds that the allegations charged did not state an offense. (C. 137) On October 12, 1990, the trial court heard defendant's motion to dismiss for failure to state an offense, and thereafter denied the motion. (C 161)

On October 12, 1990, public defender James Groat was appointed to represent the defendant.

Beginning on August 19, 1991, the defendant was brought to trial before a jury. (R. 282 et seq.) Some of the witnesses were called to show the inaccuracies in the college transcripts which formed the bases of the charges.

Douglas Wooley, an employee in the registrar's office at the University of Michigan, testified that People's Exhibit 1 was not an accurate transcript for Vivian Givan [the maiden name of the defendant in this case]. People's Exhibit 2 was an accurate copy of the defendant's University of Michigan transcript. (R. 454-455, 457, 459-460) Karen Waltz, the registrar for the State University of New York at Buffalo Law School, testified that People's Exhibit 4 was a certified copy of the defendant's transcript, and people's Exhibit 3 was not an accurate certification of the defendant's transcript. (R. 485-489)

Other witnesses were called apparently in an attempt to form a chain of custody for the evidence. Jeanette Ezra testified that she was employed by the Office of Affirmative Action at Northern Illinois University. (R. 514)

Ezra testified that she personally placed the time and date stamp upon People's Exhibits 5 and 6, which were documents and materials pertaining to defendant's earlier employment application at Northern Illinois University (NIU). (R. 516-519) Ezra also testified that she placed the time stamp upon People's Exhibit 11, and that the defendant was hired by NIU. (R. 529-531) George Shur, NIU legal counsel, testified that he met with Pettit and gave her certain documents. (R. 609, 612) Richard Alms, who works in the NIU postal service, testified that on March 28, 1989, he delivered the mail to the NIU law school, specifically to Dawn in the library. (R. 685-686) In turn, NIU librarian clerk Dawn Horn testified that, on March 28, 1989, she sorted the mail and gave it to Lois Coleman. (R. 688-690). Mary King, an administrative aid in the provost's office at NIU, testified that

she *thought* that People's Exhibit 1 was mailed to and received by her, but she did not testify with certainty. (R. 722-726) Lois Coleman, a secretary in the law school, testified that she received and date stamped People's Exhibit 3, the SUNY transcript on March 28, 1989. (R. 733, 735) Leonard Strickman, dean of the NIU college of law, testified that he received People's Exhibit 14 and 15, and met with Pettit to discuss the case. (R. 760, 762-763)

Marilyn Monteiro, NIU director of affirmative action, testified that she and other persons interviewed the defendant for the position of assistant director of affirmative action, and determined her salary. Monteiro did *not* rely upon (or even see) the transcripts when making these decisions. (R. 548-549, 554-555) Francis Nowick, assistant NIU provost, testified as to summaries of certain

conversations he claimed to have had with the defendant. (R. 628, 630-635, 647-648) Ann Kaplan, executive assistant to the NIU president, testified about her discussions with Frank Nowick and purportedly the defendant. (R. 652, 654-668)

Additional witnesses testified as to their involvement in the investigation. Richard Musil, a detective with the Village of Westmont, testified that he assisted Pettit of the NIU campus security department, with the execution of a search warrant on May 23, 1989. (R. 746-9) Likewise, Westmont Officer Vincent Musial testified as to his assistance in the execution of the search warrant. (R. 769-773) Ralph Taylor of the NIU campus security department was also called to testify. (R. 775) Taylor testified as to his observations during the execution of the search warrant in Westmont. (R 776 et seq.)

The final witness for the State was Deborah Pettit. (R. 806) Pettit testified about the execution of the search warrant in Westmont and the evidence and purported statements obtained. (R. 808-838, 883-886)

Testifying on behalf of the defendant were John LaTourette, Rosemarie Ostberg, Carol Hoadley, Marilyn Monteiro, Richard Flournory, and the defendant herself. (R 283)

John LaTourette, president of NIU, held a 12 to 15 minute meeting with defendant Vivian Givan-Hammoud on the morning of March 28, 1989. (R. 931-932) This was the same date and time Exhibit 3 was received by Dawn Horn, and given Lois Coleman. (R. 688-690) Rosemarie Ostberg, director of training for civil service at NIU, testified that her records revealed that on Good Friday, March 24, 1989, defendant Vivian Givan-Hammoud was at NIU in DeKalb, Illinois, viewing training

films. (R. 934, 936) This was the same date that Exhibit 3 was allegedly mailed from Buffalo, New York. (See Exhibit 3 and envelope.)

Carol Hoadley testified that she was an employee in the provost's office at NIU. (R. 944-945) Hoadley testified about Defendant's Exhibit 4, a paper within the defendant's personnel file at NIU.

Marilyn Monteiro was also called to testify as a witness for the defense. (R. 958) Monteiro testified about her activities on Good Friday, March 24, 1989. (R. 959-961)

Richard Flournory, an employee of the affirmative action office at NIU, also testified on behalf of the defendant. (R. 980) Flournory testified about an occasion where he picked up the defendant near Lowden Hall at NIU, and the two went to a restaurant for Indian food. (R. 981-987)

Defendant Vivian Givan-Hammoud also testified on her own behalf. (R. 713) Hammoud testified that she was at work on March 24, 1989, and she testified as to her recollections of that day at NIU. (R. 994-1009) The defendant also testified that for her to drive to Buffalo, New York, would take 16 or 17 hours. (R. 1009-1010) Hammoud also testified that Defendant's Exhibit 7 was her appointment book, which showed that she had appointments on March 24, 1989. (R. 1011-1012) Hammoud also testified that she met with President John LaTourette on March 28, 1989, at about 10:45 a.m. and resigned her position. (R. 1013) This resignation was based upon NIU's EEOC violations.

After hearing the evidence, and the arguments of counsel (R. 1044-1070), and the court's instructions (R. 1070-1077), the jury returned a verdict of guilty on

Counts I and II.[2] (C. 250-251; R. 1080-1083) Thereafter, on February 6, 1992, the defendant was ordered to serve 90 days in the DeKalb County Jail *instanter*. She was also sentenced to a term of thirty (30) months probation, a $3000.00 fine, and 300 hours of community service. (C 306-307) Also on February 6, 1992, the defendant filed her notice of appeal. (C. 308)

On appeal, the defendant asserted that she was afforded ineffective assistance of counsel. (Def's br. at 16-24) The State responded in its brief by denying this claim. (State's br. at 5-7)

On December 1, 1993, the Appellate Court, Second District, filed its decision affirming the Circuit Court. The Appellate Court ruled inter alia that

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[2] A third count, alleging state benefits fraud, was dismissed pursuant to defendant's motion for directed verdict at the close of the State's case. (R. 921)

there existed no showing of ineffectiveness, and that the defendant had waived certain aspects of her claim by failing to act pro se. A copy of the decision is attached as an Appendix hereto. On December 10, 1993, the defendant filed a petition for rehearing. At pages 2-5 of the petition, defendant asserted inter alia that the Appellate Court "erred in holding that these objections were waived, did not constitute plain error and did not prejudice the defendant." On December 16, 1993, the defendant's petition for rehearing was denied.

On January 20, 1994, defendant filed her petition for leave to appeal to the Illinois Supreme Court. At pages 3 and 9-16 of the petition, defendant asserted inter alia, that "The appellate court erred in concluding that the defendant was provided with effective assistance of

counsel. The defendant's public defender failed to file pre-trial motions attacking the warrants and supporting affidavits, failed to attack the pervasiveness of the search which far exceeded the scope of the warrant, and failed to seek to suppress evidence and statements obtained pursuant to an illegal arrest. Counsel also failed to request that the jury be instructed as to the definition of 'deliver' for the offense of forgery." The petition was denied on April 6, 1994. On April 20, 1994, defendant filed a motion for leave to file motion to reconsider denial of leave to appeal, with a copy of said motion to reconsider attached thereto. On May 6, 1994, defendant's motion was denied.

Defendant-petitioner is filing this petition for writ of certiorari on July 5, 1994.

ARGUMENT

I. A defendant charged with the delivery of altered documents was denied her constitutional right to "counsel" when her public defender (a) failed to file pre-trial motions attacking the warrants and supporting affidavits which contained a substantial material misrepresentation, (b) failed to attack the pervasiveness of the search for far exceeding the scope of the warrant, (c) failed to seek to suppress evidence and purported statements obtained pursuant to an illegal search and arrest, (d) failed to request that the jury be instructed as to the definition of "deliver" for the offense of forgery, (e) again failed to request that the jury be instructed as to the definition of "deliver" after the jury requested such an instruction, and (f) excluded the defendant from that portion of the trial

where the jury's request was read and considered by the trial judge and attorneys, and

II. Where a pro se defendant failed to file certain pre-trial motions and make certain objections, and was *thereafter* appointed a public defender who rendered ineffective assistance of counsel, the pro se defendant did not *prospectively* waive her ineffective assistance of counsel claims against her public defender, and

III. The ineffective assistance of counsel test enunciated by this Court in Strickland v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, should be reconsidered and modified.

Defendant Vivian Givan-Hammoud was charged with and convicted of two counts of forgery by delivery. The gravamen of the charge was that the defendant allegedly "*delivered*" to Northern Illinois University two altered copies of her own college transcripts. (C. 41-42, 145-146)

Defendant asserts she was denied her right to competent counsel, in violation of her Sixth and Fourteenth Amendment rights. Unlike most cases wherein ineffective assistance of counsel is raised on appeal, this issue is not the product of the fanciful imagination of appellate counsel. On October 13, 1991--after trial but before sentencing, and while defendant was still represented by the assistant public defender--the trial judge heard defendant's request for the appointment of a new lawyer. (R. 1097 et seq.) At said time, defendant stated of her assistant public defender:

> . . . he tells me first that he's given all the time that he's going to, that he's got other things to do, that it's your problem, I can't be bothered . . . There has been no preparation. There has been no communication and no preparation with regard to dealing with the matter at hand or preparing for a new trial . . . There were motions that I had requested Mr. Groat to file prior to trial which would have been pretrial motions. Several of them he told me were already filed. I know for a fact they were not. (R. 1106-1107)

After hearing the defendant's concerns, the judge appointed a new lawyer. The judge also stated, "It is clear to me that there is a rather deep rift between defendant and attorney at this point." (R. 1109) This "deep rift" between attorney and client was due to counsel's ineffective representation.

The right to counsel encompasses the right to effective counsel. McMann v. Richardson (1970), 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763. The necessary requisites to make out a claim for

ineffective assistance of counsel were outlined by this Court in Strickland v. Washington (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693. A defendant must prove (1) that her counsel made error(s) so serious, and his performance was so deficient, that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment to the United States Constitution, and (2) that these deficiencies so prejudiced the defendant as to deprive her of a fair trial, i.e. a trial whose result is reliable. Strickland, 466 U.S. at 687.

With regard to the first prong of this test, a defendant fails to satisfy her burden unless the record reflects that her attorney did not render reasonably effective assistance based on a standard of objective reasonableness under prevailing professional norms, and in so

doing defendant must overcome the presumption that the challenged action or lack of action might be the product of sound trial strategy. Strickland, 466 U.S. at 687-89.

A defendant establishes actual prejudice under the second prong of Strickland by showing that a reasonable probability exists that had counsel not erred, the trier of fact would not have found her guilty beyond a reasonable doubt. Strickland, 466 U.S. at 695. A reasonable probability is one that is sufficient to undermine confidence in the outcome of defendant's trial after considering the evidence presented to the jury in its totality. Strickland, 466 U.S. at 695.

In Strickland this Court recognized that, in the interests of judicial economy, many ineffective assistance claims may be more efficiently resolved by

collapsing the two-tiered analysis and determining, at the start, whether the alleged incompetence resulted in any actual prejudice against defendant. Strickland, 466 U.S. at 697.

In his dissent in Strickland, Justice Marshall stated that the objective standard of reasonableness suffers from "debilitating ambiguity." Strickland (Marshall, J., dissenting), 466 U.S. at 708. Justice Marshall also expressed two concerns about the prejudice prong of the Strickland test. First, it is difficult to determine whether an ineffectively represented defendant would have fared better if her lawyer had been competent. Second, a guilty defendant can never show prejudice. Thus, Justice Marshall opined, Strickland is flawed inasmuch as a guilty defendant will never be deemed to have been denied the constitutional right to effective assistance of counsel.

Strickland (Marshall, J., dissenting), 466 U.S. at 710-11.

Justice Marshall also indicated that there are several aspects of criminal defense wherein latitude and deference were of less concern, and are "more amenable to judicial oversight [including] *preparing for trial*, applying for bail, *conferring with one's client, making timely objections*. . . and filing a notice of appeal. . . ." Strickland (Marshall, J., dissenting), 466 U.S. at 709 (emphasis added).

In this case, the defendant neither concedes her guilt nor calls for the complete abandonment of the Strickland test. Rather, defendant asserts that the wisdom of Justice Marshall's concerns have become readily apparent in the decade since Strickland was decided, and this Court should consider modifying Strickland.

Problems with the application of Strickland analysis can be found in the case law of the highest court of Illinois, which is the jurisdiction in which this case arose. Specifically, in the past three and one-half years--since January 1, 1991--the Illinois Supreme Court has issued 52 decisions that cite Strickland.[3]

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[3] People v. Thompkins, __ Ill.2d __, docket no. 72827 (1994); People v. Kokoraleis, __ Ill.2d __, 1994 WL 106577 (1994); People v. Hobley, __ Ill.2d __, 1994 WL 106576 (1994); People v. Kitchen, __ Ill.2d __, 1994 WL 94323 (1994); People v. Fair, __ Ill.2d __, 1994 WL 93427 (1994); People v. Coleman, __ Ill.2d __, 1994 WL 28658 (1994); People v. Tenner, 157 Ill.2d 341 (1993); People v. Hall, 157 Ill.2d 324 (1993); People v. Edgeston, 157 Ill.2d 201 (1993); People v. Towns, 157 Ill.2d 90 (1993); People v. Pugh, 157 Ill.2d 1 (1993); People v. Coady, 156 Ill.2d 531 (1993); People v. Jones, 155 Ill.2d 357 (1993); People v. Page, 155 Ill.2d 232 (1993); People v. Sutherland, 155 Ill.2d 1 (1993); People v. Strickland, 154 Ill.2d 489 (1992); People v. Patterson, 154 Ill.2d 414 (1992); People v. Johnson, 154 Ill.2d 356 (1993); People v. Ward, 154 Ill.2d 272 (1992); People v. Johnson, 154 Ill.2d 227 (1993); People v. Todd, 154 Ill.2d 57 (1992);

(continued on next page)

Of these 52 decisions, not one involves a case wherein a conviction has been overturned on the basis of ineffective

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People v. Winsett, 153 Ill.2d 335 (1992); People v. Flores, 153 Ill.2d 264 (1992); People v. Collins, 153 Ill.2d 130 (1992); People v. Emerson, 153 Ill.2d 100 (1992); People v. Caballero, 152 Ill.2d 347 (1992); People v. Pasch, 152 Ill.2d 133 (1992); People v. Odle, 151 Ill.2d 168 (1992); People v. Brigham, 151 Ill.2d 58 (1992); People v. Titone, 151 Ill.2d 19 (1992); People v. Jackson, 149 Ill.2d 540 (1992); People v. Leger, 149 Ill.2d 355 (1992); People v. Johnson, 149 Ill.2d 118 (1992); People v. Hampton, 149 Ill.2d 71 (1992); People v. Wright, 149 Ill.2d 36 (1992); People v. Ganus, 148 Ill.2d 466 (1992); People v. Easley, 148 Ill.2d 281 (1992); People v. Burrows, 148 Ill.2d 196 (1992); People v. Perez, 148 Ill.2d 168 (1992); People v. Maxwell, 148 Ill.2d 116 (1992); People v. Griffin, 148 Ill.2d 45 (1992); People v. Williams, 147 Ill.2d 173 (1991); People v. Enoch, 146 Ill.2d 44 (1991); People v. Crane, 145 Ill.2d 520 (1991); People v. Szabo, 144 Ill.2d 525 (1991); People v. Jones, 144 Ill.2d 242 (1991); People v. Pecoraro, 144 Ill.2d 1 (1991); People v. Eddmonds, 143 Ill.2d 501 (1991); People v. Spreitzer, 143 Ill.2d 210 (1991); People v. Huante, 143 Ill.2d 61 (1991); People v. Horton, 143 Ill.2d 11 (1991); People v. Neal, 142 Ill.2d 140 (1991).

assistance of counsel. In two of the cases the defendants were granted new death penalty sentencing hearings,[4] and in two of the cases the issue was remanded to a lower court.[5] In all of the 48 remaining cases, defendants' arguments based upon Strickland were rejected. Thus, in its practical application, the Strickland test affords no meaningful guarantee to the right to counsel.

Accordingly, the defendant requests that this Court reconsider and thereafter modify the present Strickland test. Specifically, the defendant asserts that this Court should hold that presumption of competency should not apply to certain categories of acts and omissions,

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4 People v. Pugh, 157 Ill.2d 1 (1993); People v. Perez, 148 Ill.2d 168 (1992).

5 People v. Thompkins, __ Ill.2d __, docket no. 72827 (1994); People v. Johnson, 154 Ill.2d 227 (1993).

including those present in this case: failure to file pre-trial motions, failure to examine the file, failure to submit proper jury instructions defining the offense, and failure to afford the defendant the opportunity to be present at crucial junctures of her own trial.

In this case, it is beyond dispute that the defendant's appointed counsel (a) failed to file pre-trial motions attacking the warrants and supporting affidavits, (b) failed to attack the pervasiveness of the search for far exceeding the scope of the warrant, (c) failed to seek to suppress evidence and statements obtained pursuant to an illegal arrest, (d) failed to request that the jury be instructed as to the definition of "deliver" for the offense of forgery, (e) again failed to request that the jury be instructed as to the definition of "deliver" after the jury requested such an instruction, and (f)

excluded the defendant from that portion of the trial where the jury's request was read and considered by the trial judge and attorneys. (C. 160-232, 254-55, 260-65, 268, 279-80, 1043, 1078-80; C. 248-49) These acts and omissions were the very type described by Justice Marshall as being "amenable to judicial oversight." Strickland (Marshall, J., dissenting), 466 U.S. at 709 (emphasis added).

Nonetheless, the Appellate Court of Illinois, Second District, affirmed the defendant's conviction, and the Illinois Supreme Court denied her petition for leave to appeal.

The Appellate Court's decision in this case is most disturbing. First, the Appellate Court held that there was "no showing of ineffectiveness" based upon the public defender's failure to file pre-trial motions, because "during a period after the defendant's dismissal of her

private counsel and before the appointment of the assistant public defender, when the defendant represented herself, she appeared pro se on three motions to dismiss and did not file the motions that she now claims should have been filed." (Slip. op. at 11) This analysis is profoundly flawed. There exists no authority for the proposition that a counsel's duty to file pre-trial motions is lessened or waived if his client previously attempted to defend herself pro se but later determined that she needed professional assistance. The Illinois Appellate Court has effectively eviscerated Gideon v. Wainwright (1963), 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799.[6]

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[6] The Appellate Court also noted that defendant's earlier prior private counsel had raised motions to dismiss, and they were denied. The Appellate Court

(continued on next page)

indicated that it was not necessary for succeeding counsel to raise them again.

The Appellate Court's position is without merit and not supported by the record. On December 28, 1989--while the defendant was represented by private counsel--the circuit court denied defendant's initial motions to quash and suppress. The State argued that the motions should be denied on the grounds that the magistrate issuing the warrants had already found probable cause. (R. 109-110) Defense counsel asserted that the prior finding of probable cause was not binding because of a material misrepresentation. (R. 110-111) Defense counsel explained that, while the issuing magistrate had based his probable cause finding on the grounds that the defendant had probably *made* the documents, the State had shifted its theory to the defendant *delivering* the documents. (R. 113)

The position of defendant's private counsel was valid. Under the pertinent statute, the making of a forged document and the delivery of such a document are not the same offenses. Compare Ill.Rev.Stat. ch. 38, pars. 17-3(a)(1) and 17-3(a)(2). See People v. Whitmer, 369 Ill. 317 (1938), and People v. Vammar, 320 Ill. 287, 293 (1926), "the making of a forged instrument and passing it as a genuine instrument are two separate and distinct felonies; proof of one not being sufficient to sustain a conviction of the other."

Nonetheless, the defendant's motions were denied without an evidentiary hearing. The trial judge stated that his

(continued on next page)

Second, appointed counsel's failure to file said motion(s) was **not** the product of some trial strategy. See Kimmelman v. Morrison (1986), 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305. Rather, it is evident from the record that counsel's crucial failure to file a motion attacking the warrants was the product of negligence and the excessively heavy caseload of an assistant public defender.

The Office of the DeKalb County Public Defender was appointed on October

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reason for denying the motion as, "You don't have any averments or anything to that effect . . . I'm going to deny it, your motion." (R. 111) Later, as the colloquy over the motions continued, the judge reiterated, "Have you made any averments or anything here in your motion?" (R. 112)

Clearly, the premise of defendant's private counsel was valid. And although private counsel withdrew shortly thereafter, defendant's public defender could and should have filed a motion which included the averments suggested by the judge. Defendant's public defender did not.

12, 1990. (C. 160) Thereafter, ten months passed before the defendant's trial commenced on August 19, 1991. (R. 282) At least for the first one-half of his term of representation--a full five months--the assistant public defender did not even examine the pertinent documents and exhibits. (R. 246-247) Indeed, the first time within the record wherein it is evident that defense counsel had examined the pertinent documents and exhibits was July 11, 1991. (R. 258, 260) This date was nearly one month after motions cut-off deadline. (R. 254-255, 262-263) And as late as August 16, 1991--just three days before trial--the assistant public defender still had not examined the defendant's personnel file at Northern Illinois University. (R. 265, 268, 279-280) As a result, the assistant public defender did not file any pre-trial

motions to quash, motions to suppress, or motions in limine. (See R. 160-232)

Third, the prejudice to the defendant was and is readily apparent. Left unchallenged were constitutional violations; the seizure of documents and items outside the scope of the warrant, including the defendant's driver's license, credit cards and financial papers (some of which were used as at trial and sentencing); the unlawful detention and questioning of the defendant without an arrest warrant; the denial of defendant's request to speak with an attorney; and the validity of a search by a Northern Illinois University security officer at the defendant's home in Westmont, Illinois, many miles from NIU and several months after her resignation from NIU for its EEOC violations.

Fourth, these failures of the public defender cannot be deemed harmless error.

At trial, the prosecution repeatedly utilized the evidence and purported statements which were the proper subjects of the motions to quash and suppress. (R. 772-773, 777-788, 802-803, 808-838, 883-886) Moreover, at sentencing, the State again utilized some of this evidence. (R. 1153-1159, 1166, 1168)

Fifth, the failure to file proper pre-trial motions was not the only error committed by the assistant public defender. In this case, it was the central claim of the defendant at trial that she did not deliver the documents in question, or confess to any delivery, and therefore did not violate Ill.Rev.Stat. ch. 38, par. 17-3(a)(2). Further, the State was unable to provide any physical evidence, or testimony for that matter, as to exactly when, where or how the University of Michigan transcript was delivered. Only one witness stated that

she thought it may have been mailed to her, and received sometime in December or January, but she could not remember and was not sure. Nonetheless, at the jury instruction conference the assistant public defender failed to request an instruction defining the central concept of "delivery". (R. 1056 et seq.)

Defense counsel's failure to request an instruction defining "deliver" cannot be excused. Absent some clarification, the jury was left to wonder precisely what the State was required to prove. The jury was left free to convict the defendant even though the legal requisites of delivery were not proven by the State.

Clearly the assistant public defender could and should have proposed an instruction defining "deliver." Instead, however, in this case defense counsel did

not tender a single instruction on any issue. (R. 1043)[7]

Sixth, exacerbating this situation was the conduct of counsel, once the jury indicated that it was having difficulty with the concept of delivery. Specifically, during deliberations, the jury sent out the following note:

> **Question:**
> **Does the person have to deliver the transcript - Can she know about it? Can she have another person cause it to be delivered. We want to know if "delivery" means that the defendant physically mailed the documents, or if we are specifically looking at whether or not she had influence in the mailings of documents. Can you clarify this for us.**

[7] And there existed no shortage of sources for such a definition instruction. As the prosecutor later noted, there exists a pattern instruction defining "deliver." IPI, Criminal 2d, No. 17.01. (R. 1079) Additionally, a statutory definition of "delivery" can be found within the Commercial Code. Ill.Rev.Stat. ch. 26, par. 1-201(14). And, finally, counsel could have relied upon an ordinary dictionary definition of "delivery," as the court did in People v. Hagan, 145 Ill.2d 287 (1991).

(C. 248) To this request, the trial judge responded, "I cannot further instruct you as to your question." (C. 249)

Defense counsel was informed of the jury's request for a jury instruction at a conference held between the judge and attorneys. (R. 1078 et seq.) Defendant was not present at this conference, and was not informed of its existence as required by law. (R. 1078; People v. Strong, 79 Ill.App. 17 (1979); People v. Jones, 40 Ill.App.3d 771 (1976).) At said conference, and in an apparent attempt to justify his own failure to submit an appropriate instruction on the central issue, and without consulting his client, defense counsel failed to have the jury fully instructed. (R. 1079-1080) Indeed, defense counsel offered no instruction even after he was informed that there existed a pattern instruction which defined "deliver." (R. 1079) These

failures by defense counsel cast a very dark shadow of doubt over the results of the trial. It appears that the defendant's convictions are more the product of a public defender's lack of preparation and omissions rather than the deliberation by a fully informed jury following a fair trial.

Nonetheless, the Appellate Court rejected this point on the grounds that the defendant waived this issue by failing to object. (Slip op. at 13.) This too is absurd. Is a defendant constitutionally required to stand up and object in order to preserve the unprofessional errors being committed by her counsel? Of course not. To require this would reduce every trial to chaos.

Seventh, the Appellate Court held that the defendant failed to show prejudice because the crime of forgery is the same, regardless of whether the

defendant did it herself or caused it to be done by another. Yet, this was not the issue. Absent a proper definition of "deliver," the jury was free to convict the defendant for either forging the documents or delivering them. Under Illinois law, however, the two offense are distinct. "The making of a forged instrument and passing it as a genuine instrument are two separate and distinct felonies; proof of one not being sufficient to sustain a conviction of the other." People v. Whitmer, 369 Ill. 317 (1938); People v. Vammar, 320 Ill. 287, 293 (1926).

Clearly, the defendant was entitled to have a properly instructed jury so that the trier of fact could engage in a proper two-part analysis.

- Did the State prove beyond a reasonable doubt that the defendant personally delivered altered college transcripts?

- If not, did the State prove beyond a reasonable doubt that the defendant caused another to deliver altered college transcripts?

A properly instructed jury would have engaged in this analysis and concluded that, under either prong, the government failed to meet its burden. The government did not prove that she personally delivered the documents. And the government did not prove that the defendant caused another to deliver the documents. Since the jury was not properly instructed, it was left without guidance as to what the proper elements were, and thus how it should conduct its analysis.

The jury's note reveals that the jurors had doubts that the defendant personally delivered the transcripts. And the State introduced absolutely no evidence that another person delivered them (let alone that another person did so at the defendant's request). Yet, here,

the jury was left free to convict the defendant even though the legal requisites of delivery were not proven by the State.

Another point was also overlooked by the Appellate Court. The jury inquired, "Can she know about it?"--i.e., is mere knowledge sufficient to convict the defendant. The State was required to prove that either the defendant "has done the act or caused it to be done by others." (App. Ct. Slip op. at 13) Mere knowledge was not sufficient to convict. The jury should have been so instructed. Clearly the defendant was prejudiced.

Finally, while the trial judge informed defense counsel of the jury's request, at the conference held between the judge and attorneys, defendant was not afforded the opportunity to be present. (R. 1078) Illinois case law indicates, however, that this situation should have been handled in the presence of the

defendant. People v. Strong, 79 Ill.App. 17 (1979), citing People v. Jones, 40 Ill.App.3d 771 (1976). In light of the "deep rift" that had developed between defense counsel and his client (R. 1109), it was most improper for defense counsel to proceed without his client being present. Likewise, it was exceedingly unfair for the Appellate Court to hold that the instant defendant acquiesced in her counsel's errors.

In the end, it is apparent that the Appellate Court ignored the admonishment of this Court in Strickland, "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight. . . ." Strickland, 486 U.S. at 689. Does this admonishment apply equally to both sides? Or is it only to be applied to the detriment of defendants? In this case, the Illinois Appellate Court

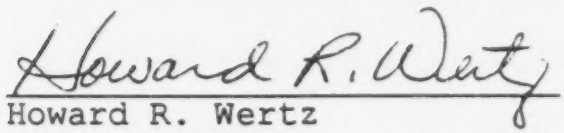
held that professional errors would be deemed nonprejudicial because the defendant failed to act pro se to prospectively preserve her rights. Clearly this was not what this Court intended in Strickland.

CONCLUSION

Wherefore, for the foregoing reasons, the defendant-petitioner requests that this Court grant her petition for writ of certiorari, reverse her conviction, and remand this cause for further proceedings.

Respectfully submitted,

Vivian Givan-Hammoud,
Defendant-Petitioner, By:



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APPENDIX

[Filed December 1, 1993]

No. 2-92-0152

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of De Kalb County
Plaintiff-Appellee,	)	
v.	)	No. 89-CF-130
VIVIAN GIVAN HAMMOUD,	)	Honorable Philip L DiMarzio,
Defendant-Appellant.	)	Judge, Presiding.

ORDER

The defendant, Vivian Givan Hammoud, was found guilty, following a jury trial in the circuit court of De Kalb County, of two counts of forgery in violation of section 17-3(a)(2) of the Criminal Code of 1961 (Ill. Rev. Stat. 1991, ch. 38, par. 17-3(a)(2) (now 720 ILCS 5/17-3(a)(2) (West 1992)). She was sentenced to 30 months' probation, which included 90 days' incarceration in the De Kalb County jail.

She now appeals, alleging: (1) that she was denied effective assistance of counsel; (2) that the trial court erred in failing to provide the jury with an instruction defining the term "deliver" for the offense of forgery; (3) that she was not proved guilty beyond a reasonable doubt; (4) that college transcripts are not instruments capable of defrauding; and (5) that the judge erred in denying the defendant's motion to dismiss for improper venue. We affirm.

At trial, Jeanette Ezra testified that she was employed as staff secretary in the Office of Affirmative Action at Northern Illinois University (NIU) in December of 1988. At that time, the Office of Affirmative Action advertised for an Assistant Director of Affirmative Action. The advertisement stated that information was to be submitted to Ezra. The defendant applied for the position. Ezra testified

that she personally placed the time and date stamp upon documents and materials pertaining to the defendant's employment application at NIU. The defendant was interviewed on December 6, 1988; began work on January 4, 1989; and remained in her position for three months.

Marilyn Monteiro, the Director of Affirmative Action at NIU, testified that she and other persons interviewed the defendant. They determined the defendant's salary based in part upon her representation that she had a Ph.D. from the University of Michigan (U of M).

Mary King, administrative aid to the Assistant Provost for Personnel, Frank Nowick, testified that the defendant's U of M transcript was mailed to her at the NIU Provost's office in late December 1988 or early January 1989. She checked the degree conferred against what the defendant's employment papers had

indicated. She also checked to make sure that the transcript had an official seal on it. She then placed it in the defendant's file. Additionally, in late December 1989, King received a short letter addressed to her in the Provost's office. It indicated that the defendant had enclosed the requested documentation. The defendant's NIU personal data sheet accompanied the letter. King placed it with the rest of the defendant's personnel file.

Leonard Strickman, the Dean of the NIU College of Law from 1981 to 1990, testified that in January 1989 the defendant gave him three documents: (1) her application for admission to the NIU College of Law, (2) a letter in support of and explaining her application for admission, and (3) a $25 check representing an application fee. He gave these three documents to Lois Coleman, a

secretary in the Admissions Office. Coleman established a file for the defendant.

Judith Malen, the Director of Admissions and Financial Aid at NIU College of Law, testified that she met with the defendant on February 9, 1989. They discussed the defendant's application to the College of Law and the fact that her transcript had not been received from the State University of New York at Buffalo Law School (SUNY). The defendant indicated that the transcript had been requested from SUNY. On March 13, 1989, the defendant called Malen and indicated that the problems with getting the SUNY transcript had been cleared up and that a new request had been submitted.

Richard Alms, who works in the postal services at NIU, testified that on March 28, 1989, he delivered the mail to Dawn Horn at the NIU College of Law. Horn, a

librarian clerk at the NIU College of Law library, testified that she sorted the mail on March 28, 1989. She gave the mail for the Admissions Office to Coleman. Coleman testified that on March 28, 1989, he received and date stamped a SUNY transcript for the defendant. It was brought to him by Dawn Horn. The envelope it was in was postmarked March 24, 1989, in Buffalo, New York. He took it to Dean Strickman. He also received a law school application and a letter of recommendation for the defendant. The letter of recommendation was dated March 24, 1989.

The defendant testified that she got to work at around 7:45 a.m. on March 24, 1989. She testified that she and Rosemarie Ostberg, the Director of Training for Civil Service Personnel at NIU, watched films in her office for most of the morning. She further testified that at around noon, she and Richard Flournory,

who is employed in the Affirmative Action Office for Civil Service Employees at NIU, went to lunch. Additionally, she testified that she returned from lunch at about 1:05 p.m. and then met with Annette Hernandez until around 3:00 p.m. She further testified that she left the office at about 5:30 p.m. Her testimony was offered to show that she could not have mailed the SUNY transcript in Buffalo, New York on March 24, 1989, since she was at work at NIU in DeKalb, Illinois on that date.

Ostberg testified that on her calendar for March 24, 1989, between 8:00 a.m. and 12:00 p.m. it said "view films, Viv, office." She testified that she was not sure whether she viewed films on that day; but, if she did, they were over at around 10:00 or 10:30 a.m. Flournory testified that he could not remember whether he had lunch with the defendant on March 24, 1989.

Francis Nowick, the Assistant Provost for Personnel at NIU, testified that on April 3, 1989, he met with the defendant. Ann Kaplan, the Executive Assistant to the President at NIU, was also present. Nowick testified that he told the defendant that he had received a letter from the U of M indicating that she had not received a Ph.D. from that institution. Nowick testified further that the defendant responded that she had received a Ph.D. Additionally, Nowick testified that he showed the defendant the transcript and asked her if it was a transcript of her enrollment and course work at the U of M. She responded that it was. Nowick testified that he told the defendant that something was obviously wrong, because he had a document saying she had received a Ph.D. from the U of M, but people at the U of M indicated that they do not have any record of her receiving a Ph.D. The

defendant indicated that she could clear this up. She indicated that there was some possibility that there had been a mix-up of her credentials and the credentials of her aunt.

Nowick further testified that on April 5, 1989, he and Kaplan had another meeting with the defendant, The defendant brought in some documentation that she had defended her dissertation. Kaplan testified that the defendant said that she had been admitted to candidacy for a degree from the U of M, that she had defended her dissertation, that there had been a request on the part of the committee that she make some revisions to the dissertation, that she had submitted or was about to submit the revisions, and that therefore her transcript indicated her receipt of the Ph.D. on the date that she would have received the Ph.D. had she gotten the revisions in on time.

Detective Deborrah Pettit, an officer with the NIU Police Department, met with George Shur, the Legal Counsel at NIU, on April 11, 1989. Shur gave Pettit a U of M transcript for the defendant, from the defendant's personnel file in the Provost's office. He also gave her the defendant's resume from the Affirmative Action files. He got the resume from Jeanette Ezra. Additionally, he gave Pettit a letter from the defendant to Mary King in the Provost's office; that letter was in the official NIU personnel file. Detective Pettit kept these documents in her locked desk in her office.

On April 17, 1989, Dean Strickman met with Detective Pettit. He identified the defendant's letter of recommendation from Virginia Leary, a Professor of Law at SUNY. He also showed Pettit the defendant's application for admission to the College of Law at NIU. Pettit kept the

documents locked in her desk drawer.

On May 23, 1989, based upon Detective Pettit's complaint, the magistrate issued a search warrant for the defendant's home. A search of the defendant's home was conducted on that same day. The following items were seized pursuant to the search: seals from the U of M and SUNY; a folder that contained blue stickers bearing the name "Douglas Wooley"; a stamp reading, "This is an official transcript. Do not release to student under any circumstances"; paper which is the type used for checks and transcripts; and SUNY Faculty of Law and Jurisprudence letterhead stationery and envelopes.

Detective Pettit testified that after the search, the officers went to the Westmont Police Department. The defendant followed in her car. Detective Pettit and Sergeant Ralph Taylor, Detective Pettit's supervisor, interviewed the defendant.

Detective Pettit placed the U of M transcript on the table in front of the defendant and asked her if she had made it. The defendant said "yes." She added that she had changed the date of birth and other dates so that her husband would not know her true age. Detective Pettit asked her how it was made. The defendant explained in detail how she had made it. The defendant indicated that she had made changes in the letter grades from incompletes to letter grades and that she had placed certain stamps and the U of M seal on the document. She said that she had had the seal made. She also said that she had had the blue stickers made for her and that she had placed the blue sticker on the document. She also said that she had added the Ph.D. and admitted that one of the people on her doctoral committee had since died and that she thought she needed to replace that name with one of

somebody currently at the U of M to make the transcript look better.

Detective Pettit also asked the defendant about the SUNY transcript. The defendant admitted that she made it, and described how. The defendant indicated that the SUNY transcript was sent to NIU because NIU requested it when she applied to the NIU College of Law. She said that she had changed some grades and dates. She said that she put the SUNY seal, which she had had made, on the document. She also indicated that she stamped the document: "This is an official transcript. Do not release to student under any circumstances." She said that she had had this stamp made as well.

The defendant indicated that she had not made a postmark on the documents. She said that she had driven to Detroit to visit her parents; driven from there to Buffalo, New York; and placed the SUNY

transcript in the mail in Buffalo. She indicated that he did this because she wanted to have the Buffalo postmark on the envelope.

The State's Attorney's office was advised of Detective Pettit's findings. At the NIU Police Department, Detective Pettit tagged and logged the evidence and Sergeant Taylor placed it in a controlled evidence secured area. The items were signed out to Detective Pettit shortly before trial. After signing the evidence out of the evidence locker, Detective Pettit brought it to the State's Attorney's office.

On June 28, 1989, the defendant was charged by information with two counts of forgery. Count I of the information alleged that the defendant knowingly delivered to NIU a document capable of defrauding others, namely a college transcript with her name on it purportedly

made by the U of M. Count II alleged that the defendant knowingly delivered to NIU a document capable of defrauding others, namely a college transcript with her name on it purportedly made by SUNY.

The defendant filed a motion to quash arrest and suppress evidence and a motion to suppress statements. The bases for the motions were: (1) that the police lacked probable cause at the time they searched and at the time they arrested the defendant; (2) that the evidence and statements were neither made pursuant to a lawful warrant nor incident to a lawful arrest; and (3) that the evidence and statements were obtained in violation of the defendant's constitutional rights. The defendant also filed a motion to dismiss for improper venue and for failure to specify the time and place of offense.

The trial court held a hearing on: (1) the defendant's improper venue motion; (2)

her motion to Suppress evidence and quash arrest; and (3) her motion to suppress statements. The trial court denied all the motions.

The defendant next filed a motion to dismiss on the grounds that the charges did not state an offense. The trial court heard the defendant's motion and denied it.

At trial, Douglas Wooley, Associate Registrar at the U of M, testified that the defendant's submitted transcript, purportedly from the U of M, was not an accurate transcript. Wooley identified an accurate copy of the defendant's U of M transcript and pointed out the differences. Among other things, there were differences in grades, dates, degrees, and majors.

Karen Waltz, the Registrar at SUNY, identified a certified copy of the defendant's school record. Waltz also

testified that the defendant's submitted transcript, purportedly from SUNY, was not an accurate transcript.

A jury found the defendant guilty of both counts of forgery. She was sentenced to 30 months' probation, which included 90 days' incarceration in the De Kalb county jail.

On appeal, the defendant first asserts that she was denied effective assistance of counsel when her assistant public defender (1) failed to file a pre-trial motion attacking the warrants and supporting affidavits; (2) failed to seek to suppress evidence and statements; and (3) failed to request that the Jury be instructed as to the definition of "deliver."

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was professionally deficient and that the

deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. (Strickland v. Washington (1984), 466 U.S. 668, 687, 104 5. Ct. 2052, ____, 80 L. Ed. 2d 674, 693.) Unless a defendant makes both showings, she cannot prevail on an ineffective assistance of counsel claim. (Strickland, 466 U.S. at 687, 104 5. Ct. at ____, 80 L. Ed. 2d at 693.) The defendant must establish that counsel's representation fell below an objective standard of reasonableness (Strickland, 466 U.S. at 688, 104 5. Ct. at ____, 80 L.Ed. 2d at 693), and that there is a reasonable probability that, were it not for counsel's professional shortcomings, the result of the proceeding would have been different (Strickland, 466 U.S. at 694, 104 5. Ct. at ___, 80 L. Ed. at 698). A reasonable probability is a probability sufficient to undermine confidence in the

outcome. (Strickland, 446 U.S. at 694, 104 5. Ct. at ___ 80 L. Ed. 2d at 698.) A court hearing an ineffective assistance of counsel claim must consider the totality of the evidence before the judge or jury. Strickland, 446 U.S. at 695, 104 5. Ct. at ____, 80 L. Ed. 2d at 698.

The defendant first asserts that the assistant public defender assigned to her case both failed to file a pre-trial motion attacking the warrants and the supporting affidavits and also failed to seek to suppress evidence and statements. However, the attorney that she initially retained and late; dismissed did file such motions; the court denied them. The defendant has cited no authority for her argument that even though the matter was previously ruled upon, it was necessary that succeeding counsel raise it again. In addition, during a period after the defendant's dismissal of her private

counsel and before the appointment of the assistant public defender, when the defendant represented herself, she appeared pro se on three motions to dismiss and did not file the motions that she now claims should have been filed. We find no showing of ineffectiveness based on this claim.

The defendant also argues that she was deprived of effective assistance because counsel did not tender a jury instruction defining the term "deliver." She further argues that it was plain error for the trial judge not to provide the jury with such an instruction.

The defendant was charged with the unlawful delivery of her altered U of M and SUNY transcripts. Accordingly, the jury was instructed:

> "To sustain the charge of forgery, the State must prove the following propositions:

First: That the defendant knowingly delivered a transcript so that it appeared to have been made by another; and

Second: That the defendant did so with intent to defraud Northern Illinois University; and

Third: That the transcript was apparently capable of defrauding.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty."

The jury was also instructed: "A person commits the offense of forgery when she,

with intent to defraud, knowingly delivers a transcript apparently capable of defrauding which she knows has been made or altered so that it appears to have been made by another."

At the instructions conference, defense counsel did not offer an instruction defining the term "delivery." In addition, when the jury asked the trial court to explain whether the defendant herself had to actually deliver the forged document or whether evidence that she merely caused it to be delivered would be enough to find the defendant guilty, the defense counsel did not object to the judge's proposed response which was, "I cannot further instruct you as to your question." That response was made and the jury was not provided with an instruction defining the term "deliver."

It is well established that the failure to object at trial to an asserted error in

jury instructions waives the question, and no party may raise on appeal the failure to give an instruction unless she tendered it at trial. (People v. Huckstead (1982), 91 Ill. 2d 536, 543.) To be preserved, error must be objected to at trial and raised in a post-trial motion. (People v. Enoch (1988), 122 Ill. 2d 176, 186.) Since the defendant failed to object to the asserted error in jury instructions at trial, she has waived the issue on appeal.

The defendant suggests that we consider this issue under the plain-error exception to the waiver rule (134 Ill. 2d R. 615(a)). We find the plain-error exception inapplicable.

When a forgery is charged, the question whether a defendant has done the act himself or caused it to be done by others is important only in determining the method used and the persons involved in accomplishing the same unlawful act.

(People v. Whitmer (1938), 369 Ill. 317, ___ .) The crime in either case is the same. Whitmer, 369 Ill. at ___.

Because of the identity of the crime in either of the two cases in question, there was no prejudice to the defendant when the trial court refused to explain the difference between the defendant delivering a forged document or causing the document to be delivered. (See Whitmer, 369 Ill. at ___,) Both actions constitute the same crime and if the defendant is found to have completed either act, she is guilty of forgery. (See Whitmer, 369 Ill. at ___.) A finding of guilt was not invalid regardless of which definition of delivery was employed by the jury. (See Whitmer, 369 Ill. at ___.) We conclude that it was not plain error for the judge to refuse to give the instruction defining "deliver." (See 134 Ill. 2d R. 615(a).) We further conclude

that the defendant was not deprived of effective assistance of counsel by the lack of the instruction defining "deliver"; there was no showing of prejudice to the defense. See Strickland, 466 U.S. at 687, 104 5. Ct. at ____, 80 L. Ed. 2d at 693.)

The defendant next contends that she was not proved guilty beyond a reasonable doubt. She claims that the State failed to prove that she delivered the instruments in question and failed to prove a sufficient chain of evidence as to items that were introduced.

A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. (People v. Collins (1985), 106 Ill. 2d 237, 261.) When reviewing the sufficiency of the evidence, on appeal the relevant question is whether, after reviewing all

the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Collins, 106 Ill. 2d at 261.

The defendant first seeks review on the issue of proof of her delivery of the altered transcripts. We find that there was sufficient evidence to support the jury's finding that the defendant delivered or caused to be delivered the two altered transcripts to NIU.

In forgery cases, proof must often be by circumstantial evidence. (People v. Baylor (1975), 25 Ill. App. 3d 1070, 1074.) We observe, briefly, that these documents were received in connection with the defendant's application for employment and her application to law school. The academic transcripts in question had been altered in such a fashion as to indicate that she had attained a higher level of

education with better grades than was, in fact, true. We find that the circumstances surrounding the delivery of the transcripts indicate that only the defendant stood to benefit by the alteration in question and that only she would have been likely to deliver them or to cause them to be delivered.

While the circumstantial evidence points to the defendant, even more compelling evidence was introduced at trial. Two witnesses, Sergeant Taylor and Detective Pettit, testified that the defendant admitted altering and delivering the transcripts. The officers also testified to their search of the defendant's home, during which they found transcripts from the U of M and SUNY and a brass box containing the seals of those two schools. Based on this record, we find no insufficiency in the proof on delivery.

The defendant also raises an issue of

the sufficiency of the chain of custody as to the items that were introduced as evidence. The case law is clear on the issue of chain of custody. To establish a sufficient chain of custody, the State need not exclude every possibility that the evidence was tampered with, but only that it was reasonably probable the evidence was unchanged in any important respect, or substituted. (People v. Shiflet (1984), 125 Ill. App. 3d 161, 178.) Unless the defendant provides actual evidence of tampering or substitution, the State need only establish the above stated probability; any deficiencies go to the weight and not to the admissibility of the evidence. Shiflet, 125 Ill. App. 3d at 178.

The record in this case lacks any affirmative showing of tampering or substitution. The record also lacks any basis from which to conclude that anyone

other than the defendant would have replaced her official transcripts with altered transcripts showing a higher level of education. We find that in the case at bar, the chain of custody was sufficiently complete to allow admission of the evidence. See Shiflet, 125 Ill. App. 3d at 178.

The defendant next argues that college transcripts are not instruments capable of defrauding another within the meaning of section 17-3(c) of the Criminal Code (Ill. Rev. Stat. 1991, ch. 38, par. 17-3(c) (now 720 ILCS 5/17-3(c) (West 1992)). The defendant's argument suggests that the forgery statute was intended to protect financial and business documents to the exclusion of other types of documents.

Case law does not bear out the defendant's argument for exclusive application of the statute. For example, the forgery statute has been utilized in

an election fraud case when the defendant was convicted of forging absentee ballots in a local mayoral election. (People v. Lindbeck (1990), 202 Ill. App. 3d 831, 832.) Likewise, the forgery statute has been held to encompass the falsifying of enrollment and registration data in order to obtain educational grant funds for persons who were not entitled to them. (People v. East-West University, Inc. (1987), 163 Ill. App. 3d 44, 48.) Thus, there exists no apparent limitation of the application of the forgery statute to financial documents.

The test for determining whether a document is apparently capable of defrauding another is whether a reasonable and ordinary person might be deceived into accepting the document as being true and genuine. (People v. Tarkowski (1982), 106 Ill.App. 3d 597, 601.) In the language of section 17-3(c) of the Criminal Code,

"[[a] document apparently capable of defrauding another includes, but is not limited to, one by which any right, obligation or power with reference to any person or property may be created, transferred, altered or terminated." (Ill. Rev.Stat. 1991, ch. 38, par. 17-3(c) (now 720 ILCS 5/17-3(c) (West 1992).) It is the province of the jury to decide whether the document might, under the circumstances, deceive the person to whom it was tendered into accepting it as genuine. Tarkowski, 106 Ill. App. 3d at 601-02.

The record in this case demonstrates an alteration of the transcripts in question. The State introduced as evidence the defendant's official transcripts from the u of M and SUNY, as well as the submitted documents purported to be made by those two institutions. The submitted documents were accepted by the provost's office at NIU and by the Admissions Office at the

NIU college of Law, respectively, as the defendant's official college transcripts. Both transcripts contained what purported to be the official seals of the two institutions.

We find the evidence sufficient to show that the submitted transcripts were capable of deceiving a person as to their veracity and, thus, affecting the rights of another. NIU, as an employer, has the right to receive accurate and truthful information concerning the educational background and qualifications of prospective employees. This information has a bearing on whether the prospective employee will be hired at all and on how much compensation will be paid if the applicant is hired. other prospective employees have the right to a fair selection process where the employer receives all applicants' qualifications based on accurate information.

Similarly, the Admissions Office at the NIU college of Law has the right to true and accurate information concerning the qualifications of law school applicants. Other applicants have the right to a fair selection process for admission to law school based on accurate information concerning all of the applicants. Additionally, the U of M and SUNY, as educational institutions, have the right not to have altered transcripts which are purported to be official transcripts of the universities themselves sent by former students to potential employers and to law schools.

The record includes evidence that NIU relied on the submitted transcripts. Further, by its verdict the jury found: (1) that the defendant knowingly delivered the transcripts so that they appeared to have been made by another; (2) that the defendant did so with intent to defraud

NIU; and (3) that the transcripts were apparently capable of defrauding. The decision of the jury that the purported transcripts had the apparent capability of defrauding should not be disturbed, since it is supported by the evidence adduced at trial. See Tarkowsky, 106 Ill. App. 3d at 603.

The defendant's final argument is that the trial judge erred in denying her motion to dismiss because of improper venue. The defendant argues that the judge misunderstood the nature of motions filed pursuant to section 114-1(a)(7) of the Code of Criminal Procedure (Ill. Rev. Stat. 1991, ch. 38, par. 114-1(a)(7) (now 725 ILCS 5/114-1(a)(7) (West 1992)).

The facts of this case are analogous to those in People v. Hagan (1990), 199 Ill. App. 3d 267, aff'd (1991), 145 Ill. 2d 287, as concerns venue. In Hagan, the venue issue involved whether the proper

situs of the crime of forgery was the county from which the forged document was "faxed" or the county to which it was sent. (Haqan, 199 Ill. App. 3d at 285-86.) In Haqan, this Court found that venue would be proper in either the county from which the document was "faxed" or the county to which it was sent. Haqan, 199 Ill. App. 3d at 286.

In the case at bar, the question is whether the proper venue is the county from which the forged transcript was mailed or the county to which it was sent. We find that by analogy to Haqan, in the case at bar, since both forged transcripts were sent to NIU in De Kalb County, De Kalb County was a proper venue for the trial. (See Haqan, 199 Ill. App. 3d at 286.) Thus, the trial court properly denied the motion to dismiss for improper venue.

For all of the foregoing reasons, the

judgment of the circuit court of De Kalb County is affirmed.

Affirmed.

GEIGER, J., with BOWMAN and COLWELL, JJ,, concurring.

[Filed August 23, 1993]

[IN THE CIRCUIT COURT OF]

[De KALB, COUNTY, ILLINOIS]

[PEOPLE V. VIVIAN HAMMOUD]

[No. 89-CF-130]

We, the jury, find the defendant, Vivian Hammoud, Guilty of the offense of Forgery (Count 1 - University of Michigan Transcript).

[signature]

Foreperson

[other jurors' signatures]

[Filed August 23, 1993]

[IN THE CIRCUIT COURT OF]

[De KALB, COUNTY, ILLINOIS]

[PEOPLE V. VIVIAN HAMMOUD]

[No. 89-CF-130]

We, the jury, find the defendant, Vivian Hammoud, Guilty of the offense of Forgery (Count II - University of New York at Buffalo-School of Law Transcript).

[signature]

Foreperson

[other jurors' signatures]

[Filed August 23, 1993]

[IN THE CIRCUIT COURT OF]

[De KALB, COUNTY, ILLINOIS]

PEOPLE OF THE STATE OF ILLINOIS, Plantiff

vs.

Vivian Hammoud, Defendant

No. 89CF130

ORDER

This cause coming on for Jury trial and Jury having heard the testimony and considered the exhibits and arguments of conusel and having returned the following verdicts:

Count I - (University of Michigan Transcript) - Guilty

Count II (SUNY - Buffalo Transcript) - Guilty

Judgement on verdicts is hereby entered. Pre-Sentence investigation ordered.

Sentencing scheduled for October 11, 1991 at 1:30 P.M. and hearing on motions is filed.

State's motion to revoke bond is heard and denied.

Defendant is not to leave the State of Illinois except between 8-23-91 to 8-29-91. Defendant to personally appear at Adult Court Services on 8-29-91 at 1:30 P.M.

Dated August 23, 1991

ENTER [signature], JUDGE

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

vs.

Vivian Hammoud, DEFENDANT

No. 89CF130

CIRCUIT COURT

16th JUDICIAL CIRCUIT

DEKALB COUNTY

FEBRUARY 6, 1992

ORDER GRANTING PROBATION

This cause coming on before this Court for the purpose of sentencing, and the defendant being present, and having been advised of Constitutional rights, right to trial by a jury, right to appeal, and further the defendant having been adjudicated guilty of the offense of Forgery (2 counts),
and having made application for Release on Probation, and the Court, having

considered all evidence and information offered, and the Court further being fully advised in the premises;

IT IS THEREFORE OFFERED that the defendant's application for Release on Probation be and hereby is granted, and that the defendant be released on probation for a period of THIRTY (30) months from the date hereof, during which time said cause shall stand continued, and the defendant shall be under probationary care of the Chief Probation Officer of the Court and of such other probation officer(s) as shall be nominated or appointed.

IT IS FURTHER ORDERED that defendant's Release on Probation shall be upon compliance with the following terms and conditions of probation:

X 1. Said defendant shall not during the term of probation, violate any criminal laws of any jurisdiction or any ordinance of any jurisdiction.

X 2. Said defendant shall not during the term of said probation, leave the State without the consent of the Court.

X 3. Said defendant shall make a monthly report or as often as the Court may direct of his or her whereabouts, conduct and employment, and furnish such other information relating to conditions of probation as may be required to the probation officer under whose charge said defendant is placed, and shall appear in person before the Court at such times as the Court may direct or rule of court may provide.

X 4. Said defendant shall refrain from

possessing a gun
or other dangerous weapon.

5. Said defendant shall make restitution or reparation in amount not to exceed actual loss or damage to property and pecuniary loss, Court determining amount and conditions of payment as follows

X 6. Said defendant shall report to Coordinator, Community Restitution Program, 133 E. State Street, Basement, Sycamore, IL (815) 895-9161, Ext. 917, within 48 hours to perform 300 hours of community restitution work as directed.

X 7. Said defendant shall pay $3,000.00 + felony costs of 108.20 as follows: over period of probation

X 8. Said defendant shall serve a term

of incarceration in DeKalb County Jail, as follows: Ninety (90) days commencing instanter with good time

X 9. Other: Probation fee waived

Dated this 6th day of February, 1992

Enter: [signature]

Judge

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

vs.

Vivian Hammoud, Defendant

No. 89CF130

February 6, 1992

CIRCUIT CLERK

16th JUDICIAL CIRCUIT

DEKALB COUNTY

ORDER SENTENCING DEFENDANT TO

INCARCERATION IN DE KALB COUNTY JAIL

This cause coming on to be heard for sentencing, and the defendant being present in open court, (and being represented by counsel), and the State being present, and the defendant having been duly of all Constitutional rights and the right to trial by jury, and the defendant having been adjudicated guilty of Forgery (2 counts) and the Court being fully advised in the premises:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

X 1. That the above named defendant be sentenced to serve a term of incarceration in the Dekalb County Jail, said term of imprisonment to be 90 days, commencing 2-6, 1992, at 5:00 P.M.

2. That the above named defendant be sentenced to serve a term of Periodic Imprisonment in the DeKalb County Jail, said term of imprisonment to be _____commencing _____,19__, at___ M. in each ____thereof.

3. That the above named defendant be sentenced to a period of Work Release imprisonment to be _____commencing _____19__ at ____ _m. with the above named defendant to be released from said incarceration from

_____ to pursue employment/education, and during said term of release, the defendant shall take the most direct route to and from said place of employment or education and not stop at any business establishment or other location except as necessary to fulfill the terms of employment/education.

4. That said sentence shall run concurrently with the sentence received in Case # _____.

5. That said defendant shall be given credit for time already served of ___ days.

X 6. That said defendant shall pay $3,000.00 fine and felony court costs, said assessments to be paid as follows: over period of probation.

X 7. Other: Good time to Apply

Dated this 6th day of February, 1992

Enter _____, Judge

STATE OF ILLINOIS APPELLATE COURT

SECOND DISTRICT

OFFICE OF THE CLERK

708/695 3750

APPELLATE COURT BUILDING

ELGIN, ILLINOIS

60120-5558

Appeal from the Circuit Court of County of DeKalb

Trial Court Number 89CF130

THE COURT HAS THIS DAY, 12/16/93, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-92-0152

People v. Hammoud, Vivian Givan

Upon consideration by the court

petition for rehearing filed by defendant-appellant, is hereby denied.

(Geiger, Bowman, Colwell, JJJ.)

LOREN J. STROTZ, Clerk

cc: Howard R. Wertz
Honorable Michael P. Coghlan
William L. Browers, Deputy Director
Mary F. Rooney
Norbert J. Goetten Dir. State's Atty.
Prosecutor

ILLINOIS SUPREME COURT

JULEANN HORNYAK, CLERK

SUPREME COURT BUILDING

SPRINGFIELD, ILL. 62706

(217)782-2036

April 6, 1994

State's Attorneys Appellate Prosecutor
Second Judicial District
2032 Larkin Ave.
Elgin, IL 60123

No. 76733 - People State of Illinois, respondent, v. Vivian Givan-Hammoud, petitioner. Leave to appeal, Appellate Court, Second District

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 28, 1994.

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING

SPRINGFIELD 62706

MAY 6, 1994

JULEANN HORNYAK

Clerk of the Court

(217)524-8132

FIRST DISTRICT OFFICE

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Chicago, 60601

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for the Deaf

(312)793-1333

Mr. Howard R. Wertz

Attorney at Law

2748 Lighthouse Court

Lynwood, IL 60411

Dear Mr. Wertz:

THE SUPREME COURT TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 76733 - People State of Illinois, respondent, v. Vivian Givan Hammoud, petitioner.

The motion by petitioner for leave to file a motion for reconsideration of the order denying petition for leave to appeal is DENIED.

This Court's mandate has issued forthwith to the Appellate Court, Second District.

JH/hc

cc: SAAP/Elgin
SA/DeKalb
AG/Crim